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No. 00-1167

In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., a California non-profit corporation and membership organization, *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to Bi-State Compact, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I TRPA'S BRIEF IS REMOVED FROM REALITY	3
II WHETHER A REGULATION IS REASONABLE, AND WHETHER IT NONETHELESS REQUIRES COMPENSATION ARE SEPARATE QUESTIONS	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. U.S., 364 U.S. 40 (1960) 10

Boston Chamber of Commerce v. Boston, 217 U.S. 189 (1910) 4

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 2

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 9

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 9

Suitum v. Tahoe Reg. Plan. Agency, 520 U.S. 725 (1997) 1

U.S. v. Dickinson, 331 U.S. 745 (1947) 6

INTRODUCTION

One might think that the Tahoe Regional Planning Agency (TRPA) would be proud of its work. Its mission was to maintain the clarity of Lake Tahoe by restricting development of the surrounding land. The Petitioners at bench are testimonials to the success of TRPA's efforts. For more than two decades, TRPA's policies have prevented any development of the hundreds of subdivided residential lots they owned.

And yet, rather than proclaiming its success from the proverbial rooftops, TRPA denies that it has done any such thing. According to TRPA it merely enacted a modest, short-term moratorium while it drafted its plan. Nothing more. And that, goes the argument, caused only a minor disruption in the ability of the Petitioners to use their land. This is simply not so, as the Court can readily determine from its own decision in *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997) – which dealt with one such lot. In fact, TRPA has been phenomenally successful in stifling development. These individuals have been forced to subsidize the rest of us by TRPA's forced grant of a clear zone around the lake in order to preserve its beauty for the ages. Their property has been taken and they are entitled to compensation.

TRPA's brief seeks to demonstrate two things: First, that it didn't really do much; and second, that what it did was reasonable. Neither is a defense. The first is belied by the record (nothing has been built on the subject land for the two decades since TRPA enacted its first "temporary" moratorium). The second is wrong as a matter of law. The facts will be discussed presently. For now, suffice it to

note that neither the reasonableness nor the propriety of TRPA's actions is relevant. The fact that a regulation may be reasonable and proper doesn't eliminate the Constitutional need to compensate when the regulation deprives the owners of regulated land of *all* economically productive use. Litigation under the Just Compensation Clause *presumes* that the regulator is acting within its powers. Otherwise, such actions would be *ultra vires* and void. Rather, the 5th Amendment:

> "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of *otherwise proper interference amounting to a taking.*" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 [1987]; emphasis added.)

At bottom, the continuing vitality of this Court's *First English* opinion hangs in the balance. As the five Judges who dissented from the 9th Circuit's views aptly put it:

> "*First English* recognized that the costs its decision imposed upon local regulators 'necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.' " (App. 167; citation omitted.)

> "The panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English*. . . . [W]e are not free to rewrite Supreme Court precedent. . . . " (App. 157.)

Without a grant of certiorari, this Court's regulatory taking precedents will have been rewritten, if not abrogated, for a large swath of the western United States.

I

TRPA'S BRIEF IS REMOVED FROM REALITY

TRPA's summary of what the 9th Circuit did – and did not – do is breathtaking for its refusal to deal with what actually happened during the last 20 years, and for its denial that the 9th Circuit actually did what TRPA asked:

First, TRPA asserts: "The court of appeals did *not* rule 'that a temporary moratorium can *never* require constitutional compensation.' " (Br. In Opp., p. 7; emphasis original.)

In fact, that is *precisely* what the 9th Circuit ruled. It did so by contrasting a temporary taking with a full fee taking and concluding that it is only the latter that constitutionally requires compensation. The reason offered for that was that the life of the land is infinite, and a temporary moratorium will eventually expire and permit use. Because of that, reasoned the 9th Circuit, the temporary moratorium cannot be considered a taking legally, any more than economically. (App., p. 38, fn. 26.)[1] The problem with that approach is that while the life of the land

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[1] TRPA says that the opinion below says expressly that some moratoria might be takings, thus belying the property owners' charge. (Br. In Opp., p. 8.) We prefer to let the opinion speak for itself:

> "Of course, were a temporary moratorium designed to be in force so long as to eliminate all present value

may be infinite, human lives are not. And, as Justice Holmes put it, the Constitution deals with persons, not with tracts of land. (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 [1910].) Thus, to tell mortal people that in the sweet bye and bye they, or perhaps their descendants, *might* be able to use their land is to take it from them.

Of course, the point of the 5th Amendment, like the rest of the Bill of Rights' protections, is to safeguard individuals from governmental overreaching. Here, those individuals own property. It is their individual interests that are at stake, and those are entitled to constitutional protection. Except in the 9th Circuit.

Second, TRPA asserts: "The court did *not* rule that a land use regulatory agency can 'escape its consfitutional duty to pay for land . . . by the expedient of enacting a series of rolling, back-to-back 'temporary' moratoria/prohibitions extending over a period of 20 years.' " (Br. In Opp., p. 7; emphasis original.)

In fact, however, that is *precisely* what the 9th Circuit did. By refusing to examine the totality of TRPA's 20 years of regulating this land and, instead, examining each enactment of a prohibition, or freeze, or moratorium as though it were an independent action, unrelated to any

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of a property's future use, we *might* be compelled to conclude that a categorical taking had occurred. *We doubt, however, that a true temporary moratorium would ever be designed to last for so long a period.*" (App., p. 38; emphasis added.)

other action, the courts below permitted TRPA to effectively sterilize all productive use of this land indefinitely.[2]

Third, TRPA asserts: "Nor did the court of appeals hold that TRPA can 'compel[ ] a selected group of individual landowners to forego *all* use of their individual homesites, and thereby compel a *de facto* donation of their land for public use without compensation.' " (Br. In Opp., p. 7; emphasis original.)

It is difficult to understand what court of appeals opinion TRPA was reading. For the entire thrust of the decision below is that the few hundred owners of subdivided but undeveloped residential lots in zones 1, 2, 3, and SEZ have been put in *precisely* that position. However sliced, they may not use their land for any purpose. Period.

Moreover, to the extent that TRPA argues that – from the standpoint of any of the property owners at bench – there was any serious difference among the various plans and moratoria applied between 1981 and the present, the record belies it. (Eg., App., p. 76.)

Finally, TRPA continues its ploy of insisting that each regulatory freeze that it enacted, each stone that it added to the pile of regulatory prohibitions it forced these landowners to carry, must be viewed as an independent act,

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[2] This approach of viewing each component of a unitary problem as if it were a discrete event is often derisively referred to as "salami slicing tactics." It would be difficult to come up with a better example of such tactics than TRPA's argument.

disconnected from the others, and reviewable only on its own. (Br. In Opp., *passim*.)

This is a key flaw in TRPA's "salami tactics" argument that is common to many of the errors committed below. For example, the courts below refused to consider at all the use prohibition under the 1987 plan. That plan has been in effect for more than 13 years now. It is simply the latest in the series of prohibitory regulations enacted by TRPA to keep this land sterile. It didn't exist when the landowners filed their initial complaints in 1984. It was adopted while they were on appeal from initially having their complaints dismissed. Indeed, in *TSPC I*, the 9th Circuit dismissed as moot some of the claims regarding the 1984 plan, in light of its replacement by the 1987 plan. (App., p. 79.) On remand, the complaint was amended to include claims against the 1987 plan. (App., p. 80.) As the complaint being litigated was timely filed as to the regulations as they existed, an amendment to it should likewise have been timely – particularly since the landowners were on appeal at the time of the latter's adoption, fighting for their litigational life. (Compare *U.S. v. Dickinson*, 331 U.S. 745, 748-749 [1947], discussed at Pet., pp. 26-28.)

The same is true as to the 1984 plan itself. The courts below refused to permit any recovery for its three years of stultification on the ground that an injunction granted by a different judge in a different case precluded TRPA from issuing any permits. TRPA says that was a "fact-bound finding. . . . " (Br. In Opp., p. 14.) It was nothing of the sort. First, the District Court said it was a legal

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conclusion. (App., p. 105.)[3] Second, it is clear from the face of the 1984 Plan itself:

> "Development within land capability district 1-3 is not consistent with the goals to manage high hazard lands for their natural qualities and shall generally be prohibited except under extraordinary circumstances involving public works." (App., p. 173.)

The trial judge knew that. He noted that, for these landowners, "not much changed" from the 1981-1984 moratoria to the 1984 Plan; essentially *no* use was permitted. (App., p. 76.)

But, says TRPA, the injunction by the other judge " 'nullified' the Plan's 'escape mechanisms' which could have permitted development on petitioners' lots." (Br. In Opp., p. 15.) That's a misrepresentation of the record and of the 1984 Plan. The Plan as adopted *had no "escape mechanisms"* and TRPA cites none. The most that the trial court could say was that the injunction prevented TRPA *from considering whether to adopt* any such mechanisms, and what they might be. (App., p. 76.)

Understandably, TRPA doesn't want to address the reality that it created, or to have it reviewed by this Court.

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[3] The findings ended at App., p. 82, where the legal conclusions began.

II

WHETHER A REGULATION IS REASONABLE, AND WHETHER IT NONETHELESS REQUIRES COMPENSATION ARE SEPARATE QUESTIONS

There is no question that even the two year-eight month moratoria series examined by the 9th Circuit denied the landowners all economically productive use during that period. The trial court expressly so found (App., p. 99), and the Court of Appeals affirmed that factual finding (App., p. 40, fn. 30).

Where TRPA and the 9th Circuit got off the Constitutional track was in their theory that, as long as the moratorium was "reasonable", there could be no need to provide 5th Amendment compensation. They are wrong.

This Court has repeatedly held that the underlying substantive validity of even a reasonable regulation and the Constitutional need to compensate those injured by it are separate questions. That is plainly what the Court meant when it concluded that the 5th Amendment:

> "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of *otherwise proper interference amounting to a taking.*" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 [1987]; emphasis added.)[4]

It is simply too late in the day to suggest that the 5th Amendment's just compensation command can be

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[4] This Court has consistently so held. See cases cited at. Pet., p. 24, fns. 26 and 27.

trumped by governmental concern for enacting a regulation – no matter how useful, or even necessary, that regulation might be. As Justice Holmes wrote for the Court nearly a century ago, rephrasing the eternal verity that there is no such thing as a free lunch:

> "[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air in its domain. It has the last word as to whether its mountains shall be stripped of their forests and inhabitants shall breathe pure air. *It might have to pay individuals before it could utter that word,* but it remains the final power." (*Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 [1907]; emphasis added.)

The fact that the ends of government regulations may be of great benefit to society does not address the separate question of the means by which those benefits should be achieved, including the payment of compensation for those whose property is taken in the process. Put another way, the government may not take property without just compensation, no matter how desirable and important the reasons for the taking. Because "the public wanted it very much" (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 [1922]) is not a permissible basis for gratifying that desire "by a shorter cut than the constitutional way of paying for the change." (*Id.* at 416.) Both TRPA and the 9th Circuit ignored this basic tenet of this Court's jurisprudence, necessitating this Petition.

CONCLUSION

The Petitioners have suffered grievously to provide the rest of us with protection for the national treasure known as Lake Tahoe. Under our Constitutional system, as this Court held in *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960), they should not be singled out to do so. They cannot prevent the government from enacting regulations that preclude all economically productive private use of their land. But the 5th Amendment stands as a shield against their being compelled to do so at their own expense, without any compensation from those who benefit by preventing the use of this land.

The Petitioners pray that certiorari be granted and the 9th Circuit's decision be reversed so that they may finally receive the compensation the Constitution promises.

Respectfully submitted,

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